Filed 2/13/19 P. v. Gerolaga CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. TONY RAMON GEROLAGA, Defendant and Appellant.	C086451 (Super. Ct. No. STK-CR-FE-2003-0006717)

Defendant Tony Ramon Gerolaga appeals from the trial court's denial of his Penal Code section 1170.18[1] resentencing petition. He contends the trial court erred in finding the crime of unlawfully driving or taking a vehicle (Veh. Code, § 10851) ineligible for relief. Finding defendant's attempted murder conviction renders him ineligible for relief, we shall affirm.

---

[1] Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

"Defendant Tony Ramon Gerolaga, Jr., brutally beat and robbed two victims in two separate incidents. A jury found him guilty of attempted murder, assault, robbery, witness intimidation, auto theft, and false imprisonment." (*People v. Gerolaga* (Aug. 1, 2005, C045811) [nonpub. opn.].) He was sentenced to a state prison term of life with the possibility of parole plus 18 years four months. (*People v. Gerolaga*, *supra*, C045811.) On appeal, we modified the conviction to stay imposition of sentence pursuant to section 654 for the false imprisonment count, reducing the sentence by eight months, and affirmed the judgment as modified. (*People v. Gerolaga*, *supra*, C045811.)

On September 21, 2016, defendant filed a section 1170.18 petition for resentencing on his Vehicle Code section 10851 conviction. The People filed an opposition asserting the crime was ineligible for resentencing. The trial court summarily denied the petition without providing a reason for its ruling.

DISCUSSION

Proposition 47, the Safe Neighborhoods and Schools Act of 2014, reduced certain felonies to misdemeanors, including, as relevant here, theft, by adding section 490.2, which states in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (§ 490.2, subd. (a).)

Section 1170.18, subdivision (a) provides: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this

act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ."

In a case decided after the trial court denied defendant's resentencing petition, the California Supreme Court held that Vehicle Code section 10851 convictions "are not categorically ineligible for resentencing" under section 1170.18. (*People v. Page* (2017) 3 Cal.5th 1175, 1189 (*Page*).) Accordingly, "obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Page*, at p. 1187.) However, a defendant convicted under Vehicle Code section 10851 for nontheft activity can be subject to felony punishment even if the vehicle is worth $950 or less. (*Page*, at p. 1188.) Defendant contends the order denying his petition must be reversed and the matter remanded for an evidentiary hearing on his petition.

As the last phrase of section 490.2 quoted above suggests, not every vehicle theft is eligible for relief even if the vehicle stolen is $950 or less. "This section does not apply to a person who has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." (§ 1170.18, subd. (i).) Among the so-called "super strike offenses" listed in section 667, subdivision (e)(2)(C)(iv) is "[a]ny homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive." (§ 667, subd. (e)(2)(C)(iv)(IV).) Defendant's conviction for attempted murder thus renders him ineligible for relief.

Defendant asserts in his reply brief that this was not the basis for the trial court's denial, and the only argument set forth by the People was that Vehicle Code section 10851 convictions were ineligible for relief.

"There is perhaps no rule of review more firmly established than the principle that a ruling or decision correct in law will not be disturbed on appeal merely because it was

given for the wrong reason. If correct upon any theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion. [Citations.]" (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568; see *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1119, fn. 4 ["A reviewing court will uphold a judgment if it is correct for any reason ' "regardless of the correctness of [its] grounds . . . ." [Citation.] "It is judicial action and not judicial reasoning which is the subject of review" ' "].)

The record shows defendant was convicted of attempted murder, and that conviction is final. He is ineligible for relief notwithstanding *Page*, and the trial court's denial of his petition was correct.

DISPOSITION

The judgment (order) is affirmed.

BUTZ, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.